GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Application No. 13349, of BNA Washington, Inc., pursuant to Paragraph 8207.11 of the Zoning Regulations, for a variance to continue to operate a parking lot (Sub-section 4502.5) in a C-R District at the premises 1221-31 - 25th Street, N.W., (Square 24, Lots 43, 95, 837, 842 and 862).

HEARING DATE: October 15, 1980
DECISION DATES: November 5 and December 3, 1980

FINDINGS OF FACT:

1. At the commencement of the public hearing, Nicholas A. Addams, counsel for Philip J. Brown, made a preliminary motion to exclude the law firm of Wilkes and Artis from representing the applicant in the subject case. The grounds for the motion were that Wilkes and Artis was in violation of the disciplinary rules of the American Bar Association regarding conflict of interest. The Chairman reserved a decision on the motion pending hearing of the application on its merits.

2. At the conclusion of the hearing, counsel for the opposition was invited to submit a full written motion and brief on the conflict of interest issue. Counsel filed such a motion, marked as Exhibit No. 20 of the record. Counsel for the applicant responded with a brief marked as Exhibit No. 23 of the record.

3. Disciplinary Rule 9-101(B) of the American Bar Association states that a"lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee."

4. Several members of the firm of Wilkes and Artis were employees of the Office of the Corporation Counsel during the period from 1972 through 1978, when the first parking lot application was filed by the BNA. Those members included C. Francis Murphy, Iverson O. Mitchell,III and Louis P. Robbins.

5. The opposition argued that the subject application was the same matter as the adoption of the CR District and later litigation in the Superior Court regarding the permissible height of buildings in the CR District. The opposition further argued that Messrs Murphy, Mitchell and Robbins had a substantial responsibility regarding those matters while employed by the District Government.

6. Counsel for the applicant argued that the subject application is not the same matter as the earlier proceedings, and therefore that no other facts were at issue.

7. Upon review of the motion and briefs for and against the Board finds that the pending application for a variance is not the same matter as either of the prior actions which members of the Wilkes and Artis firm participated in as public employees; that is, the creation, adoption and mapping of the CR District and the resulting litigation over certain height restrictions of that District. The variance is being sought under the requirements of Paragraph 8207.11 from the requirements of Sub-section 4502.5. There is no direct connection between the legislative proceedings of the Zoning Commission to adopt the District and the specific issues of fact presented by the variance application. There are no facts or inside information arising from the CR rezoning or height litigation that would be pertinent to the granting or denial of this application.

8. The subject parking lot is located on the east side of 25th Street between M and N Streets, N.W., and is known as premises 1219 - 25th Street, N.W. It is in a CR District.

9. To the north, separated by a fifteen foot alley are two office buildings owned by the applicant. To the south, separated by a fifteen foot alley, are lots used for parking and one single family dwelling. Further south along the 2400 block of M Street are a store, a private parking area, a garage type of structure and the M Street entrances to the parking facility. To the east, separated by a thirty foot alley and fronting along 24th Street is a pharmaceutical supply facility and a B and W parking garage. To the west, on the opposite side of 25th Street, is the Francis Junior High playing field and at the northwest corner of the intersection of 25th and M Streets is a parking lot.

10. The applicant and its predecessor in title have continuously leased space for the operation of a parking lot on the subject premises since 1967. The use is recognized by surrounding property owners and long term lessees as being in existence for an extended period of time.

11. Since the demolition of structures on the subject lots, the area has been surfaced with macadam, lined for parking spaces and used for parking purposes.

12. Parking Management, Inc. (PMI), as the operator of the lot at the time, failed to file for a new certificate of occupancy for the subject site when the subject lots were added to an existing parking lot in approximately 1967. In 1967 the subject site was zoned C-M and could have been used for parking purposes as a matter-of-right.

13. A commercial parking lot was permitted as a matter-of-right under the C-M-2 zoning classification which existed on the subject property from 1958 to December 29, 1974. On December 27, 1974, the subject property was rezoned to C-R, where a parking lot is prohibited.

14. The Board in its Order No. 12727, dated January 26, 1979, granted the applicant's request for a variance to permit the filing of a Certificate of Occupancy for the subject parking lot, which had been in existence on the effective date of the designation of the CR District. The Board granted approval of the continuance of the lot for eighteen months. The Board in its Findings of Fact and Conclusions of Law noted that the applicant sought the use of the lot as an interim use, pending construction which was contemplated within two years. Order No. 12727 is incorporated herein and made a part of the subject Order.

15. The subject lot contains approximately 13,000 square feet. It has accommodations for approximately 100 vehicles. The lot is an attended lot. Its hours of operation are approximately 7:30 a.m. to 6:30 p.m., Monday through Friday. The Board finds that the subject lot is in compliance with the previous Order of the Board. There were no complaints of record as to the maintenance and operation of the said parking lot.

16. The representative of the applicant restified that because of the existing economic situation, with the high interest rates and the cost of construction and the inability to secure an FAR swap with other property owners, the applicant was not able to take full advantage of the eighteen months that the BZA Order No. 12727 provided to proceed with the construction of a building which would be suitable to the needs of the company. The applicant still proposes to build a third building and is going to file an application for a PUD, singly or jointly, to seek permission to construct a seven-story office building.

17. The applicant argued that, prior to the construction of a new building on the subject lot, there was no reasonable interim use of the property other than a parking lot. The Board agrees.

18. Advisory Neighborhood Commission-2A, made no recommendation on the application.

19. There was opposition to the continuation of the subject parking lot on the part of the B and W Parking Management, an individual property owner and the Dupont Circle Citizens Association. The basic argument was that approximately twenty months had expired since the previous Order had issued, and that the applicant is still in the same position. There are no formal plans to develop the lot, no architect, no builder and no financing. There was argument that the lot should be closed and its users seek the other available parking facilities in the neighborhood and that the site be developed for housing.

20. The B and W Parking Management, Inc. further argued that this parking lot had an adverse effect on other property in the area, by causing a decrease in the number of vehicles parking at the adjacent garage owned by B and W.

21. As to the arguments raised in opposition, as set forth in Finding No. 17, the Board has found that there is no reasonable use of this property other than a parking lot on a short term, interim basis The ultimate use and development of the property is unknown. Even to proceed to construction on a mixed-use development, permitted as a matter-of-right will take time. As to the adverse effect on the adjoining parking garage, the subject lot has been in existence for many years. There is no evidence to suggest that any adverse economic consequences recently suffered by the garage owner is related at all to the subject lot. Furthermore, citation of a competitive advantage or disadvantage suffered by a party is not a proper basis for deciding a variance application.

22. At the public hearing, the opposition requested that certain portions of an agreement between the applicant and a potential development partner be submitted for the record. The applicant filed the requested information. The opposition then objected and moved to strike the document as submitted. The Board finds that the document was submitted as requested by the opposition, and that the document speaks for itself. The Chairman ruled to deny the motion to strike.

CONCLUSIONS OF LAW AND OPINION:

Before proceeding to determine the subject application on its merits, the Board must first dispose of the preliminary motion to disqualify the firm of Wilkes and Artis as applicant's counsel in this proceeding. As to this motion, the Board pursuant to the ruling of the D.C. Court of Appeals in Brown v. District of Columbia BZA, 413A.2d 1276 (D.C. App. 1980) will address first the issue whether the subject BNA parking lot variance application is the same matter as the adoption by the Zoning Commission of the CR District in the West End in December 1974 or the height litigation instituted by the Carr Co. in 1975.

Based upon the entire record before this Board, the Board concludes that the subject application does not constitute the same matter. The subject premises have been continuously used as a parking lot since 1967. A Certificate of Occupancy No. B48227, issued December 3, 1964, authorized for public lot use the subject premises. The lots at issue were added approximately in 1967. At that time, the subject site was zoned C-M and ould have been used for parking purposes as a matter-of-right. The Board in its Order No. 12727 found that there was no evidence that the applicant acted in bad faith but rather in ignorance in failing to obtain a valid certificate of occupancy, By its Order, the Board permitted the filing for a certificate of occupancy for a use in existence on December 27,1974, the effective date of the rezoning of the site from C-M-2 to C-R. Accordingly, there is a gap of some seven or eight years from the creation of the parking lot to the rezoning of the site in 1974 and the Carr litigation in 1975.

Other than that the subject site was part of the C-R rezoning, the Board finds no connection between the subject variance application and the rezoning and litigation matters. The Board concurs with the applicant's argument that there are no common issues of fact or law. All three matters are distinct and separate. The Board concludes that there is no "same matter" connection between the case and any other prior matters which members of the Wilkes and Artis firm participated in as public officials. The Board concludes that there is no basis for disqualification on the grounds of conflict of interest, and the request is therefore denied.

Having concluded that there is no "same matter" connection, the Board concludes that it has disposed of the motion to disqualify the firm of Wilkes and Artis. The Board need not entertain the arguments of substantial responsibility or screening of attorneys formerly employed by the D.C. Corporation Counsel and now employed by the firm of Wilkes and Artis in each of the alleged related zoning matters relating to the subject premises.

As to the merits of the subject application, the Board concludes that the requested variance is a use variance, the granting of which requires a showing of a hardship stemming from the property itself. Further, the applicant seeks the use as an interim use pending approval of a PUD application still to be filed with the Zoning Commission.

The subject lots are surrounded by another parking lot, a parking garage, two office buildings and a playing field. The Board concludes that no other viable interim use could be made of the subject property and that denial of the application would deprive the owner of a reasonable use of the property for the interim period. The hardship is thus in the property itself.

The Board is not unmindful of the grounds of the opposition set forth in finding of fact No. 19. The Board in granting this application will condition the grant to a limited period of time. The Board alerts the applicant that its findings and conclusions are based on short-term, interim use constraints. The Board hereby advises, notwithstanding the present economic conditions, the applicant to formulate immediate plans for the subject site.

The Board further concludes that the relief can be granted as an interim use without substantial detriment to the public good and without substantially impairing the intent, purpose and integrity of the zone plan. Accordingly, it is ORDERED that the application is GRANTED SUBJECT to the following CONDITIONS:

a. Approval shall be for a period of ONE YEAR effective from the date of the expiration of the former Certificate of Occupancy, namely July 26, 1980.

b. All areas devoted to driveways, access lanes, and parking areas shall be maintained with a paving of material forming an all-weather impervious surface.

c. Bumper stops shall be erected and maintained for the protection of all adjoining buildings.

d. No vehicle or any part thereof shall be permitted to project over any lot or building line or on or over the public space.

e. All parts of the lot shall be kept free of refuse or debris and shall be paved or landscaped. Landscaping shall be maintained in a healthy growing condition and in a neat and orderly appearance.

f. No other use shall be conducted from or upon the premises and no structure other than an attendant's shelter shall be erected or used upon the premises unless such use or structure is other wise permitted in the Zoning District in which the parking lot is located.

g. Any lighting used to illuminate the parking lot or its accessory building shall be so arranged that all direct rays of such lighting are confined to the surface of the parking lot.

VOTE: On the Motion to Disqualify applicant's Counsel: 5-0 (Walter B. Lewis, Connie Fortune, Charles R. Norris, Douglas J. Patton and William F. McIntosh to DENY)

VOTE: On the variance 4-1 (Walter B. Lewis, Charles R. Norris, Connie Fortune and Douglas J. Patton to GRANT; William F. McIntosh OPPOSED).

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

ATTESTED BY: Steven E. Sher
STEVEN E. SHER
Executive Director

FINAL DATE OF ORDER: 12 MAY 1981

UNDER SUB-SECTION 8204.3 OF THE ZONING REGULATIONS "NO DECISION OR ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN DAYS AFTER HAVING BECOME FINAL PURSUANT TO THE SUPPLEMENTAL RULES OF PRACTICE AND PROCEDURE BEFORE THE BOARD OF ZONING ADJUSTMENT."

THIS ORDER OF THE BOARD IS VALID FOR A PERIOD OF SIX MONTHS AFTER THE EFFECTIVE DATE OF THIS ORDER, UNLESS WITHIN SUCH PERIOD AN APPLICATION FOR A BUILDING PERMIT OR CERTIFICATE OF OCCUPANCY IS FILED WITH THE DEPARTMENT OF LICENSES, INVESTIGATIONS, AND INSPECTIONS.